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No. 94-1462

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

LUCAS P. BAEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAURI STEVEN FILPPU
JOAN E. SMILEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals correctly held that Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c), deprived it of jurisdiction to consider petitioner's challenge to an executed order of deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 41 F.3d 19. The opinions of the Board of Immigration Appeals (Pet. App. 17a-28a) are unreported, as is the decision of the immigration judge (Pet. App. 29a-41a).

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1994. The petition for a writ of certiorari was filed on March 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1972, at the age of 12. Pet. App. 2a, 20a. In 1986, petitioner was convicted by a Massachusetts court of distributing cocaine and was imprisoned. *Id.* at 2a. The Immigration and Naturalization Service (INS) then instituted deportation proceedings against petitioner, charging him with deportability under Section 241(a)(11) of the Immigration and Nationality Act (Act), 8 U.S.C. 1251(a)(11) (1988), as an alien convicted of a controlled substance offense. Pet. App. 2a.[1]

Petitioner, who was represented by counsel, conceded his deportability but applied for discretionary relief from deportation under Section 212(c) of the Act, 8 U.S.C. 1182(c) (1988 & Supp. V 1993).[2] An

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[1] Section 241(a) of the Act was amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602(a), 104 Stat. 5077. The revisions, which recodified Section 241(a)(11) of the Act as Section 241(a)(2)(B)(i), 8 U.S.C. 1251(a)(2)(B)(i) (Supp. V 1993), apply only to deportation proceedings for which notice was given on or after March 1, 1991, and thus do not apply to petitioner. See IMMACT § 602(d), 104 Stat. 5082. The former version of Section 241(a)(11), 8 U.S.C. 1251(a)(11) (1988), provided for the deportation of any alien "convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance."

[2] Section 212(c) authorizes the Attorney General to waive certain grounds for exclusion of permanent resident aliens who have journeyed abroad and who seek to "retur[n] to a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (1988 & Supp. V 1993). Although Section 212(c) by its terms applies only to exclusion proceedings, the same discretionary waiver provisions have been held to be available in

immigration judge granted petitioner's request for relief. Pet. App. 29a-41a. The INS appealed that decision to the Board of Immigration Appeals (Board or BIA). In a decision issued on September 30, 1993, the Board, with one member dissenting, reversed the decision of the immigration judge and denied petitioner's request for discretionary relief from deportation, citing the serious adverse factors presented, including petitioner's criminal background. *Id.* at 19a-28a. The BIA also denied petitioner's motion to dismiss the INS's appeal, which contended that the INS's brief was untimely filed. *Id.* at 27a; see Admin. Rec. 27.

The INS took petitioner into custody on November 22, 1993, almost two months after the issuance of the BIA's decision. That evening, petitioner's family contacted his attorney, Paul Murphy, who claims not to have known of the BIA's decision until that time. The next day, Murphy filed a combined motion to reopen the deportation proceedings and to stay the order of deportation. The motion to reopen renewed petitioner's argument that the INS's brief to the BIA had been untimely filed. See Admin. Rec. 10.

The BIA denied the stay a few hours later, in an order signed by the Board member who had dissented from the decision rejecting petitioner's request for Section 212(c) relief.[3] The order stated that, "[a]fter

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deportation proceedings against resident aliens who meet the seven-year domicile requirement. See, *e.g.*, *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).

[3] Although the version of that order reprinted in the petition appendix is not signed, the order contained in the certified administrative record is signed by Board member Dunne. Admin. Rec. 9.

consideration of all information, the Board has concluded that there is little likelihood that the motion [to reopen] will be granted." Pet. App. 18a. Petitioner did not seek a stay from the court of appeals, and he was deported to the Dominican Republic on November 24, 1993. *Id.* at 17a. On December 13, 1993, the BIA further ruled that, because petitioner had been deported, his motion to reopen was "withdrawn by operation of law. See 8 C.F.R. § 3.2 (1993)." Pet. App. 17a.

2. Petitioner filed a petition for review in the court of appeals on March 10, 1994, almost six months after the Board's original decision.[4] The court of appeals held (Pet. App. 1a-14a) that it lacked jurisdiction over the petition due to 8 U.S.C. 1105a(c), which provides that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has

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[4] Because petitioner's attorney maintained that he never received the BIA's order reversing the immigration judge's decision, the court of appeals authorized the parties to submit factual proffers on that issue. Pet. App. 6a. The INS submitted a declaration by the BIA's supervisory case management analyst, who stated that a copy of the BIA's decision was contemporaneously mailed to Murphy at his office address of record, 6 Faneuil Hall Marketplace, Boston. *Ibid.*; see Gov't C.A. Br. Exh. A. The INS also submitted a declaration from an INS deportation officer, who stated that a document concerning petitioner's deportation was sent to the Faneuil Hall address shortly after the deportation, but was returned to the INS marked "forwarding time expired." Pet. App. 6a; Gov't C.A. Br. Exh. B & Attach. 2. At oral argument, Murphy conceded that he had moved his principal office, but he stated that he continued to maintain the Faneuil Hall office and checked that office for mail at "infrequent intervals." Pet. App. 6a-7a. He also "implied that he had never arranged to have mail forwarded from [the Faneuil Hall] address." *Ibid.*

departed from the United States after the issuance of the order." The court rejected petitioner's contention that it could exercise jurisdiction in his case, finding the statute "absolute on its face." Pet. App. 7a. The court also rejected the argument that the word "departed," as used in Section 1105a(c), encompasses only voluntary departures in the face of a deportation order, and not involuntary departures pursuant to a deportation order, observing that deportations are "the most relevant type of departures." *Id.* at 11a.

The court acknowledged that some other courts of appeals, "presumably troubled by [the] rigidity [of the statute], have read exceptions into it." Pet. App. 8a. It noted, for example, that, in a series of cases beginning with *Mendez* v. *INS*, 563 F.2d 956 (1977), the Ninth Circuit has "read section 1105a(c) as a conditional, rather than an absolute, bar, opining that '"departure" in the context of 8 U.S.C. § 1105a cannot mean "departure in contravention of procedural due process."'" Pet. App. 8a (quoting *Mendez*, 563 F.2d at 958). But the court observed that, "[s]ince the first seed was sown, the *Mendez* exception has mushroomed in the Ninth Circuit," Pet. App. 8a, and it found more persuasive the decisions of the Second, Fifth, and Tenth Circuits rejecting the Ninth Circuit's reasoning in *Mendez*, see *id.* at 9a (noting that Fifth Circuit has referred to *Mendez* as a "sinkhole that has swallowed the rule"). The court concluded that the *Mendez* "court's willingness to take liberties with the language of section 1105a(c) is mischievous and has produced bad law," and that "[t]o embellish section 1105a(c) as *Mendez* suggests is to import ambiguity into words that are as unambiguous as ordinary linguistic usage permits." *Id.* at 10a, 11a.

The court also added that, even if the statute precluding judicial review of executed deportation orders does contain an implicit exception for extreme situations, petitioner's claims are not so serious as to warrant the invocation of such an exception. Pet. App. 13a. It characterized petitioner's objection to the timeliness of the filing of the INS's brief before the BIA as "baseless." *Ibid.* The court also stated that the circumstances surrounding petitioner's deportation did not demonstrate "the type of extreme unfairness that might warrant overriding the plain language of the statute." *Id.* at 14a. It suggested that Murphy had failed to receive the BIA's order reversing the immigration judge's decision because of accidental misdelivery of properly addressed mail, and it noted that, despite the late notification, Murphy still had time to present a stay application to the BIA, and could also have sought a stay from the INS district director or the court of appeals. *Id.* at 13a-14a.

ARGUMENT

Petitioner correctly notes (Pet. 8-15) that there is some disagreement among the courts of appeals as to whether an implied exception should be recognized to the language of 8 U.S.C. 1105a(c), which precludes judicial review of a deportation order after the alien has departed from the United States. This case, however, is not an appropriate vehicle for consideration of that issue, for two reasons. First, the court of appeals lacked jurisdiction in this case over the petition for judicial review of the deportation order for the independent reason that the petition was not timely filed. See *Stone* v. *INS*, 115 S. Ct. 1537 (1995). Second, the outcome of this case would not be

different in any circuit that recognizes an exception to the preclusion of judicial review.

1. The Board of Immigration Appeals issued its decision on September 30, 1993, but petitioner did not file a petition for judicial review of that decision in the court of appeals until March 10, 1994. That petition was untimely because, under 8 U.S.C. 1105a(a)(1) (Supp. V 1993), petitioner had only 90 days in which to file a petition for judicial review of the order of deportation.[5]

Petitioner did file a motion with the BIA to reopen the deportation proceedings on November 23, 1993. That motion, however, did not toll the time for filing a petition for review of the deportation order in the court of appeals. "[A] deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider. The order being final when issued, an alien has 90 days from that date to seek review." *Stone*, 115 S. Ct. at 1549.[6] Although, at the time petitioner filed his

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[5] As the court of appeals noted (Pet. App. 5a n.4), aliens convicted of aggravated felonies have substantially less time in which to file petitions for review of deportation orders. Although petitioner's narcotics trafficking offense, if committed today, would be defined as an aggravated felony (see 8 U.S.C. 1101(a)(43) (Supp. V 1993)), the expedited review procedures apply only to aliens whose aggravated felony convictions were entered on or after November 18, 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347(b), 102 Stat. 4472. Petitioner's conviction was entered on May 21, 1986. Pet. App. 20a.

[6] Petitioner styled his motion as a motion to reopen, but it was, in substance, a motion for reconsideration. Motions to reopen deportation proceedings are limited to situations in which the petitioner brings to the Board's attention "evidence [that] is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.2.

petition for review, a First Circuit decision suggested that motions to reopen might toll the finality of deportation orders (see Pet. App. 5a n.4), that case has been superseded by this Court's decision in *Stone*, a jurisdictional ruling that must be applied to petitioner's case. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988).

Thus, the only matter that could have been raised in the court of appeals when the petition for review was filed was the BIA's decision not to reopen the deportation proceedings. When an agency "*refuses* to reopen a proceeding, what is reviewable is merely the lawfulness of the refusal." *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987); see *INS* v. *Abudu*, 485 U.S. 94, 104-105 (1988); *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985). And in cases like the present one, where the motion to reopen was based upon nothing more than a contention that the BIA made an error in its original decision, the "order which merely denies rehearing of . . . [the prior] order is not [judicially] reviewable" at all. *Locomotive Engineers*, 482 U.S. at 280.[7]

Petitioner did not allege any new evidence in his motion. In any case, the *Stone* opinion does not suggest that a motion to reopen differs from a motion for reconsideration with respect to the lack of any effect on the finality of the Board's deportation order. See *Stone*, 115 S. Ct. at 1541 (noting that Stone filed a "Motion to Reopen and/or to Reconsider").

[7] Although the Court stated in *Abudu* that the abuse-of-discretion standard applies to motions to reopen "regardless of the underlying basis of the alien's request [for relief]," 485 U.S. at 99 n.3, it was not faced in that case with a motion to reopen that merely reiterated the claims made in the prior proceedings. The motion to reopen in *Abudu* involved allegations of changed circumstances in the government of Ghana after

Even if the BIA's decision to deny petitioner's motion to reopen is judicially reviewable, the standard of review is abuse of discretion. *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *INS* v. *Abudu*, 485 U.S. at 105. In this case, there is no reasonable argument that the BIA abused its discretion in refusing to reopen the proceedings. The BIA based its refusal to reopen squarely on 8 C.F.R. 3.2, which provides, in relevant part:

> A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

"There is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derives solely from regulations promulgated by the Attorney General." *Doherty*, 502 U.S. at 322. It was therefore entirely within the agency's discretion to limit the availability of the discretionary remedy of reopening, by means of a regulation that categorically precludes further administrative consideration of orders of deportation entered against

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the immigration judge issued the initial deportation order. *Id.* at 97. In *INS* v. *Doherty*, 502 U.S. 314 (1992), the Court reviewed a denial of a motion to reopen for abuse of discretion, but that case also involved an allegation of changed circumstances—there, the Attorney General's decision to overrule the designation of the alien's country of deportation. *Id.* at 320-321 (opinion of Rehnquist, C.J.).

aliens who have departed from the United States while subject to a deportation order. And, irrespective of the correctness *vel non* of the court of appeals' construction of the *statutory* term "departed" to include departures pursuant to an executed deportation order (see p. 5, *supra*), the agency's interpretation of the term "departure" in its own regulation to include deportations is entitled to "broad deference." *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2387 (1994). But see *Wiedersperg* v. *INS*, 896 F.2d 1179, 1181 (9th Cir. 1990). Because the only issue properly before the court of appeals was whether the BIA correctly construed its own regulation to preclude it from acting on petitioner's motion to reopen, the issue on which petitioner seeks review is not properly presented.

2. This case is not an appropriate vehicle for resolution of the conflict among the courts of appeals for the additional reason that the outcome would not have been different if the case had arisen in one of the circuits that recognizes an implied exception to Section 1105a(c). No circuit has adopted the rule that petitioner champions (Pet. 16), namely, that the term "departed" does not include deportations at all. Even the Ninth Circuit, which has endorsed perhaps the broadest exception to Section 1105a(c), has concluded that an alien who has been deported pursuant to lawful procedures may not obtain judicial review of the deportation order after the deportation. See *Arreaza-Cruz* v. *INS*, 39 F.3d 909 (9th Cir. 1994).

The Ninth Circuit, reasoning that Congress did not intend the INS to avoid judicial review through "its own disregard for the law" (*Mendez*, 563 F.2d at 959), has concluded that "departure" in Section 1105a(c)

means " 'legally executed' departure when effected by the government." *Id.* at 958. Three other circuits have endorsed a somewhat more limited exception and have held that judicial review is available when the record reveals a "colorable due process claim" in the deportation proceedings. See *Camacho-Bordes* v. *INS*, 33 F.3d 26, 28 (8th Cir. 1994); *Marrero* v. *INS*, 990 F.2d 772, 777 (3d Cir. 1993); *Juarez* v. *INS*, 732 F.2d 58, 59-60 (6th Cir. 1984). But even under those decisions, petitioner could not obtain judicial review, because his deportation was legally executed, and he has no colorable claim of a due process violation.

Petitioner contends (Pet. 13) that the INS did not serve his attorney with a copy of the BIA's final order of deportation or provide his attorney with 72 hours' advance notice of the deportation, and thus argues that the INS violated his statutory right to counsel and its own regulations. But the evidence presented to the court of appeals by the INS, which petitioner did not controvert, was that the Board did mail a copy of its final decision to the record address of his attorney, Paul Murphy, in conformity with 8 C.F.R. 292.5(a). See note 4, *supra*; Pet. App. 6a. At oral argument, Murphy admitted that, in the autumn of 1993, his principal offices were located at an address different from the address of record. *Id.* at 6a-7a. While there was conflicting evidence whether Murphy had made efforts to have his mail forwarded, the failure of petitioner's attorney to make adequate arrangements for the forwarding of legal papers concerning his clients cannot be laid at the door of the INS or the BIA as a due process violation. The government took the steps required by its regulations to notify counsel of the final order of deportation issued

against petitioner.[8] Contrary to petitioner's contention (Pet. 13), therefore, this case is unlike both *Mendez* and *Zepeda-Melendez* v. *INS*, 741 F.2d 285 (9th Cir. 1984), for in each of those cases, the BIA and the INS did not attempt to notify the alien's attorney that a final order of deportation had been issued, and the Ninth Circuit therefore ruled that it had jurisdiction over the alien's petition for review because the deportation had not been legally executed. See *Zepeda-Melendez*, 741 F.2d at 288-289; *Mendez*, 563 F.2d at 959.

Furthermore, even during the short period between the time that petitioner was taken into custody and his deportation, petitioner's attorney had an opportunity to seek a stay of the deportation that was sufficient to satisfy procedural due process. During that period, petitioner's attorney filed with the BIA a motion to reopen and a motion to stay the deportation. He could have also sought an emergency stay from the INS District Director (see 8 C.F.R. 243.4), and he could have filed a timely petition for review of the deportation order in the court of appeals and sought a stay from that court.[9]

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[8] Petitioner contends (Pet. 14) that 8 C.F.R. 243.3 requires the INS to give counsel "72 hours notice of his deportation." In fact, the regulation requires only that the INS not deport an alien any sooner than "72 hours *after service*" of the BIA's final order of deportation. 8 C.F.R. 243.3(b) (emphasis added). That regulation does not define "service," but a similar regulation, governing service of written decisions by immigration judges, provides that "[s]ervice by mail is complete upon mailing." 8 C.F.R. 242.19(a).

[9] In general, the filing of a timely petition for judicial review of a deportation order and its service on the INS District Director results in an automatic stay of deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAURI STEVEN FILPPU
JOAN E. SMILEY
Attorneys

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See 8 U.S.C. 1105a(a)(3) (Supp. V 1993). However, because petitioner was convicted of a crime that is now defined to be an aggravated felony (see note 5, *supra*), he would not have been entitled to the automatic stay. That is the case even though petitioner's conviction was entered before November 18, 1988. Section 513(a) of IMMACT provides that aliens convicted of aggravated felonies are not entitled to the automatic stay, see 104 Stat. 5052, and the Immigration Technical Corrections Act of 1991 makes that exclusion applicable to aliens whose convictions for aggravated felonies were entered "before, on, or after" the effective date of IMMACT, November 29, 1990. See Pub. L. No. 102-232, Tit. III, § 306(a)(11)(B), 105 Stat. 1751. See generally *Arthurs* v. *INS*, 959 F.2d 142, 143 (9th Cir. 1992).